FILE COPY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
JAN 8 1907
JAMES H. McKENNEY,
CLERK.

No. 141.

EAST CENTRAL EUREKA MINING COMPANY ET AL.

vs.

CENTRAL EUREKA MINING COMPANY.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

JACKSON H. RALSTON,
FREDERICK L. SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Plaintiffs in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24022

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 141.

EAST CENTRAL EUREKA MINING COMPANY ET AL.

vs.

CENTRAL EUREKA MINING COMPANY.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

In addition to the extended and able brief already submitted on behalf of the plaintiffs in error, we desire respectfully to submit the following suggestions:

The defendant in error claims extralateral rights in plaintiff in error's land by virtue of defendant in error's mining patent and the laws upon which it is based. The patent in question cites the various antecedent steps as having been taken in pursuance of the act of Congress of July 26, 1866; of the act of July 9, 1870, (which does not relate to the subject-matter in controversy), and of May 10, 1872, and in consideration of the premises grants to Hall McAllister, predecessor in title to the defendant in error, the land claimed by him, following the language of section 3 of the

act of 1872 as to extralateral rights and giving the grantee the right to follow all veins other than the principal one—

> "as against all persons claiming under locations made upon such other veins, lodes, ledges or deposits subsequent to May 10, 1872."

If this deed could legally convey to Hall McAllister all the property it purported to convey, then, subject only to the effect of the subsequent deed from Hall McAllister's grantees to the plaintiffs in error, the defendants would be entitled to the mining vein claimed by them, and to the right to pursue it under plaintiff in error's land, but if, on the other hand, the patent did not or could not convey to Hall McAllister any right whatever to pursue the vein under the adjoining land, then plaintiffs in error must prevail.

A preliminary question to which we may address ourselves is,

May a Patent Convey Greater Rights Than Are Authorized by Statute?

To put this question is to answer it, and we only advert to it because the defendants in error appear to insist upon their rights under the patent as if the verbiage of the patent gave them something independent of and apart from the bald language of the statute. Our belief is that a patent cannot initiate any rights over and beyond those conferred by statute upon an entryman by his entry. A patent is merely a convenient evidence of the perfection of the rights secured by the entry, and it alike with the entry must be limited in its extent by the acts authorizing it. This is merely another way of saying that the executive officer must act within the limitations of the authority given him, and that an act going beyond such limitations is void and is subject to attack in any collateral proceeding.

Doolan *vs.* Carr, 125 U. S., 618.

Let us proceed, then, to the next question which is one of real importance, and is,

Under What Act Could a Patent be Issued on October 11, 1872 (the Date of the Patent)?

The act of 1866, in section 3, authorized the issuance of a patent, certain preliminaries being complied with. Section 3, however, was repealed by section 9 of the act of 1872. It is suggested that because section 9 contained a proviso that "such repeal shall not affect existing rights," therefore the right to a patent, certain preliminaries being met, granted by section 3 of the act of 1866 remained intact. This is, we think, a palpable error. Section 3 of the act of 1866 being repealed, Hall McAllister had no right which could be enforced against the United States whatever might be his situation with respect to right of possession as to third parties. The privilege or license, as it may be termed, to obtain a patent was not a right. This is well pointed out in the Yosemite Valley case (Hutchings *vs.* Low, 15 Wall., 67), holding that the Government might dispose of lands at any time, even though steps had been taken to pre-empt them, so long as final entry had not been made. For rights are in a degree relative. The Government could not enforce a pre-emption, and a pre-emptor might at any moment conclude that he would abandon the land in question.

In the examination of the proposition now under discussion and as sustaining our propositions, we refer also to Frisbie *vs.* Whitney, 19 Wallace, 187, and a very full discussion in Allen *vs.* Forrest, 24 L. R. A., 606.

Furthermore, section 9 of the act of 1872, in the very next sentence, shows exactly the right which was preserved, stating, as it does, that—

> "Applications for patents for mining claims now pending may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act."

We submit, therefore, that, however valuable the recitals contained in the patent may be as referring to the statute under which antecedent steps have been taken, they are not to be construed as amounting to the granting of a patent under a repealed act, the more so that the only patent allowed to be issued after May 10, 1872, was a patent which should be strictly "in pursuance of the provisions of" the act of that date.

It is interesting to note that the Supreme Court of California recognizes in this case that at the time of the passage of the act of 1872 the locator possessed no right which might not be disposed of by act of Congress, for it says (Record, p. 89, fols. 205, 206) that—

> "The rights sought by the act to be preserved were such as had been acquired under the prior acts, by the making of a valid location, *even though those rights were not of such a nature that the government might not, if it had seen fit so to do,* deprive the locator thereof."

To say that the Government may without restraint deprive you of a right is equivalent to saying that, as against the Government, you have no right; for if there be a property right you may not lose it to the Government save upon the payment of adequate compensation; and thus the California Supreme Court sustains the argument we are now making.

We are brought next to consider exactly

The Sort of Patent, as to the Boundaries, Which Could be Issued under the Act of 1872,

and we find, as we shall hereafter attempt to demonstrate, that any patent so issued was of necessity to be controlled by section 2 of the act in question, reading as follows:

> "That mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar,

lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary. The end lines of each claim shall be parallel to each other."

This section of four sentences may be analyzed as follows: The first sentence relates to mining claims theretofore located, which as to their length are to be governed by the customs, &c., in force at the date of their location. The second sentence relates to the length of mining claims located after the passage of the act. The third sentence establishes the width of all claims, as we shall contend, whether located before or after the passage of the act, as is evident from the exception the sentence contains, "where adverse rights *existing at the passage of this act* shall render such limitation necessary." The wording of this exception conclusively shows that the sentence refers to both classes of locations. The final sentence of the section, in view of the foregoing explanation, of necessity refers to the end lines of claims, whether antecedent or subsequent to the passage of the act.

If our argument be sound, as we believe it, we must conclude, first, that no patent could issue after May 10, 1872, except under the provisions of this act; and, second, that under the provisions of the act no patent could issue save for a claim where the end lines were parallel to each other.

That the construction which we now put upon this section is correct is apparent by reference to the case of Lakin *vs.* Roberts, 54 Fed., 461, in which Mr. Justice McKenna delivered the opinion. In that case the contest related to the width of locations; and, referring to section 9 of the act of 1872, incorporated as section 2328 in the Revised Statutes, the court said:

> "It is not contended that plaintiff's interests were so far vested that by that act Congress had no power to limit or vary them. We shall assume, therefore, that Congress had this power, and having it, we think it exercised it in the provisions we have quoted."

Further discussing the case, the court said that—

> "The Land Department, therefore, had no power to issue a patent for a greater width of land than three hundred feet, and the patent in this case, in excess of three hundred feet is void. Doolan *v.* Carr, 125 U. S. 624, and the other decisions cited in the opinion of the learned judge who tried the case in the circuit court."

In the case we are now discussing, as appears from Lakin *vs.* Roberts, 53 Fed. Rep., 333, the patent was based upon an entry applied for on August 30, 1867, the patent finally issuing as in the case at bar, after the act of 1872, on March 17, 1877.

We apply the reasoning in Lakin *vs.* Roberts, and insist that, as in the case referred to, an entry wider than the act of 1872 permitted was void as to excess, so now an entry the end lines of which are not parallel must be absolutely void; for, although in the Lakin case the void portion could be separated from the part that was valid, and the patent sustained in so far as it was valid, in the present case, the end lines not being parallel, it is impossible to say to what extent the patent is valid and to what extent it is void; and,

the elements being so intermingled as to be incapable of distinction, the entire patent must fail. Stating the case in another way, end lines not in uniformity with the statute are no end lines, and the patent fails for want of an adequate description, at least so far as extralateral rights are concerned.

We are not overlooking the case of Carson City Gold and Silver Mining Company *vs.* North Star Company, 83 Fed., 658, which it must be confessed is in principle upon the point now in controversy apparently on all fours with the case at bar and which sustains the contentions of the defendant in error. In the Carson City case the court held that the application, which was made after the act of 1866 not requiring parallelism of end lines, the entry being after May 10, 1872, was valid, and the Court says:

> "The act of 1866, under the provisions of which the patent in this case was applied for and under which the rights of defendant in error accrued, did not require parallelism of end lines. * * *
>
> "Moreover, the end lines as marked on the diagram converge in the direction of the dip, giving the patentees less of the vein or lode in depth than they had at the surface. The object of the act of 1872 in requiring parallelism of end lines was intended to give to the claimant of the lode as much of the lode or vein in its downward course as he has at its surface, but no more. It appears from the findings that the defendant in error was only allowed 2,200 feet of the apex of the lode because it was cut on the west by a 'crossing' as shown on the diagram. The restriction of its rights in these particulars cannot be complained of by the plaintiff in error."

We shall suggest that the first point has been already covered by our analysis of sections 2 and 9 of the act of 1872, showing that no right existed after May 10, 1872, to issue any patent where the end lines were not parallel. Further answering the suggestions of the court, we do not think that we can search for an object in the act of 1872

which will destroy its plain language, and upon this point cite the language of the court in Del Monte M. & M. Co. *vs.* Last Chance M. & M. Company 171 U. S., page 67, where it is said:

> "There is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed (sec. 2320). It is not within the province of the court to ignore such provision, and hold that a locator, failing to comply with its requirements, has all its rights extralaterally and otherwise, which he would have been entitled to if he had complied, and so it has been adjudged (Iron Silver Mining Co. *vs.* Elgin M. & S. Company, 118 U. S., 196)."

As to the further suggestion of the court, as applied to this case, that the plaintiffs in error could not complain of the restriction of their rights, the patent giving less to the defendant in error than would have been allowed it had the act of 1872 been followed, we have to say that the suggestion ignores the void character of the patent. The question as to whether their rights are affected favorably or unfavorably because of a greater or less amount of the vein being taken becomes unimportant. The rights of the plaintiff in error have been affected because the court below has given efficacy to a patent void because of non-compliance with the law. Whether the plaintiffs in error would have been affected favorably or unfavorably by a valid compliance with the law is entirely an immaterial proposition.

Discussing this matter further, let us imagine a case where the vein, instead of departing from the defendant in error's side lines on the converging side, has passed through the diverging side into the land of our adjoining holder. What then would be said of the effect of the patent upon the landowners upon such opposite side? Would the patent owners, despite the divergence of the end lines, have had the right to follow the vein in all its divergence under the land of the adjoining owners? Is the validity and effect of the patent

to be determined by the departure of the vein from between converging or diverging end lines? Is the patent, in other words, to be valid where its end lines converge, and invalid where its end lines diverge? And can the question before us be answered save by a strict adherence to the language of the act of 1872?

But it may be responded that the defendants in error have a right to rely upon section 3 of the act of May 10, 1872 (Rev. Stat., sec. 2322), the verbiage of which is incorporated into their patent, and we are brought to the question,

Does Section 3 of the Act of 1872 Dispense with Section 2 Requiring Parallelism of End Lines?

For convenience we quote all of Section 3, as follows:

> "That the locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States, and with the State, territorial, and local regulations not in conflict with said laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations: *Provided,* That their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges: *And provided, further,* That nothing in this section shall authorize the loca-

> tor or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

Study of this section shows that it has not the slightest reference to any question other than that of the possession and enjoyment of mining locations. It does not relate in any degree to their length or breadth or parallelism of the end lines, or to end lines at all, except so far as it recognizes them as bounds. It is not a change of section 2, but is to be construed as to the end lines in connection therewith. The right of locators when they apply for a patent is to be construed by reference to the other provisions of the act of May 10, 1872, governing the issuance of patents and the boundaries to be observed when patents are issued. Construing the case of Lakin *vs.* Roberts with reference to this section, we may conceive the interpretation of the court to have been that the original locators could have remained indefinitely in possession of the ground they had taken up, but that when they applied for a patent they were bound by the provisions of the statute. Applying this interpretation to the case at bar, we may say that had the defendants in error never sought a patent, but continued in possession of their claim as originally located, they might have preserved such possession indefinitely, complying with the rules as to assessment work, only paralleling their end lines and circumscribing, if necessary, their claim in its width and length when a patent should be considered desirable.

This interpretation, we submit, gives full meaning to all sections of the statute, allowing the defendant in error its full possessory rights so long as it might choose to rest upon them, and allowing it the new and additional rights which it might obtain by a patent, subject to disabilities as to the boundaries fixed by section 2 of the act.

The interpretation we are giving to the act accords with the language of the court in the case of New Dunderberg

Mining Company *vs.* Old, 79 Fed. Rep., 601, wherein the court said:

> "Conceding but not deciding that the locator of the Dunderberg claim in 1867 then had the right after the act of 1866 to follow the Dunderberg lode in any direction from his discovery shaft in which it laid, he renounced that right when he availed himself of the benefit of the act of 1872, and accepted his patent under that statute. That act provided that he might claim a patent according to its terms or that he might retain the rights he acquired under the act of 1866."

Construction of the Deed from the Defendant in Error to Toman.

This question is very fully discussed in the brief already filed and as it is, subject only to slight differences, the same question recently argued in the case of Montana Mining Co. *vs.* St. Louis Mining Co., we forbear from entering into the discussion.

As to the Existence of a Federal Question.

The facts upon which a Federal question arises are as follows:

Plaintiff and defendant in the original complaint, in the superior court of Amador county, California, were owners of adjoining tracts of land, plaintiff holding under a mineral patent and defendant under (1) agricultural patents from the U. S. and (2) a quitclaim deed from the plaintiff.

The complaint alleges the mineral patent to the plaintiff's predecessor in title; the right to follow beyond the side lines designated in the patent veins having apex within the surface boundaries; that a certain vein having such an apex passes through the side lines adjoining defendant's property; that—

> "defendant's title * * * is derived from two patents issued by the Government of the U. S. to the

predecessor in interest of the defendant. One patent was issued December 1, 1876, and the other August 20, 1878, and both were made under the laws of the U. S. providing for the sale of what is known as agricultural land?"

That by reason of their ownership of this adjoining land the defendant claims to be the owner of the vein above referred to after it passes through the vertical plane extended downward from the dividing line between the two properties; that they deny the right of the plaintiff below to such ores and have brought an action of trespass to recover $165,000 for ores extracted from said vein by the plaintiff and threaten other suits. The prayer is to quiet title and enjoin actions by defendants below (Rec., pp. 6 to 9).

By their answer the defendants below deny that the mineral patent set forth in the complaint conveyed to the patentee any extralateral rights to veins extending beyond the vertical side lines, and allege that they are owners of all veins lying beneath the surface of their land described in the complaint. They deny that their ownership or possession to said land is subject to the rights of the plaintiff to veins, lodes, &c., as claimed in the complaint.

As a further and separate defense, the defendants set forth the conveyance by the defendants, by quitclaim deed, to the defendants of—

> "All those certain lots, pieces or parcels of land, situate, lying, and being in the said county of Amador, State of California, and bounded and particularly described as follows, to wit:—
>
> "First: That portion of section eight (8) * * * lying east of that certain patented mining ground known as the Summit quartz mine."
>
> Record, pages 12 to 16. See estate granted, page 16.

The decisions below relate principally to the question of the right to the vein of ore under construction of the Federal

statutes, regardless of the effect of the deed; so that the latter can be eliminated from further consideration on the present issue, whether a Federal question is presented.

The defendants below raised the question here presented as Federal questions in trial court (Record, pp. 76, 77, and 78). They claimed, and now assert, that the plaintiffs below had no extralateral right to the vein of ore after it passes beneath the surface of their property, for the reason that under the statutory authority of the Secretary of the Interior, who issued the mineral patent, the requirement that the end lines of the claim be parallel, disregarded in this case, defeats the grant as to such extralateral rights.

That this is a question involving the construction of a federal statute; that the provision of the statute was asserted by the plaintiff in error with sufficient particularity (see California Nat'l Bank *vs.* Kennedy, 167 U. S., 362), and that the right, title, and ownership of the plaintiff in error was dependent upon the construction of that statute and is wholly defeated by an adverse decision is manifest. It is certainly within the spirit of section 709, Revised Statutes, and we think it is clearly within the letter of that statute.

Either upon a construction of the term "immunity" in that section or a liberal interpretation of the whole section, this court has frequently taken jurisdiction when the Federal question is not a right, title, privilege, or immunity granted as such in the express language of the section, but where a defense asserted is based upon a limitation in some statute relied upon by the plaintiff—an immunity from suit by reason of the existence of some provision defeating the plaintiff's right.

In the case of California Nat'l Bank *vs.* Kennedy, cited *supra,* the bank defended the action on the ground that the contract it had made with the plaintiff, then sued on, was *ultra vires* under the national banking law—that it had no power to subscribe to stock in another corporation. It was held that this defense presented a Federal question under Revised Statutes, section 709. Other cases in which the

Federal question presented arose under circumstances similar to the case at bar are:

Scoope *v.* Leffingwell, 105 U. S., 3.
McCormick *v.* Market National Bank, 165 U. S., 538.

As important in determining whether the mining law was the basis of an affirmative claim of right by the plaintiff in error, attention is called to the fact that the complaint in the present case sought to restrain the prosecution by the plaintiff in error of a trespass suit for compensation for ore, stated at one hundred and sixty-five thousand (165,000) dollars, taken by the defendant in error from the part of the vein in dispute. This suit is restrained by the action of the court now appealed from. In the trespass suit the defense made in the present suit, as shown by the complaint in this suit, is the right to the part of the vein in dispute based upon the non-existence of extralateral rights in the defendant in error under the construction of the act of 1872. The defendants "invoke" the statute for the protection of their rights.

The defendants in error state in their brief in support of motion to dismiss (page 17) that the plaintiffs in error claim the ore bodies in dispute by virtue of their ownership of the overlying surface of the adjacent land. This is not a correct statement of the facts as disclosed by the record. Their patents were subject to the rights of mineral claimants to follow veins, and to determine the extent of their grant it must be first determined what valid rights exist to follow veins under the surface of their lands. Therefore the extent of their right in respect to the veins of mineral such as that involved here depends wholly upon the construction of the mineral laws.

The reference in the agricultural patent to extralateral rights of mine owners is in effect a direct reference to the mineral laws.

Respectfully submitted,

JACKSON H. RALSTON,
FREDERICK L. SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Plaintiffs in Error.